STATEMENT

OF

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Before the

SUBCOMMITTEE ON FEDERAL WORKFORCE AND AGENCY ORGANIZATION

COMMITTEE ON GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

Regarding the Hearing on

Fair and Balanced?
The Status of Pay and Benefits For Non-Article III Judges

May 16, 2006

Mr. Chairman, Honorable members of this subcommittee and members of the staff. On behalf of the Federal Administrative Law Judge community, I thank you for this opportunity to discuss a very significant issue, compression of the pay schedule for the corps of Federal Administrative Law Judges. I am William J. Cowan, Deputy Chief Administrative Law Judge with the Federal Energy Regulatory Commission, and First Vice-President of the Federal Administrative Law Judges Conference. I have been a U.S. Administrative Law Judge for over 9 years, and I am a resident of Northern Virginia.

The Pay Compression Problem and its Implications

Sixty years ago, the Congress enacted the Administrative Procedure Act, which provided for the independent adjudication of administrative proceedings by presiding officers who later were designated as Administrative Law Judges. The Congress specifically intended that hearings before ALJs serve as the principal appellate forum within administrative agencies prior to judicial review. The judicial function performed by ALJs is known to the legal world as a key element of the process of review of agency actions, and a necessary step in the exhaustion of administrative process before judicial review. It has worked well and become a model for the fifty states, the territories, and the international legal community.

To function well, this administrative judicial function must be staffed with an ALJ corps that is chosen from among the best legal minds that the federal government and the private bar have to offer. The federal government and the American people have a great stake in this process and in a competently staffed corps of Administrative Law Judges.

My testimony will deal specifically with the issue of compensation for Administrative Law Judges, and in particular, about the problems caused by compression

of the ALJ pay schedule. As you may know, many ALJs did not receive the full increase that other federal employees received this year because the ALJ base plus locality pay rate is limited by statute to the rate for Level III of the Executive Schedule (5 U.S.C. § 5304(g)(2)). Most ALJs in the Washington region received only a 1.9% pay increase, whereas most of the federal workforce in this area received a 3.44% increase (locality pay included).

Even more troubling is the effect of compression. The ALJ pay schedule set by statute has three levels: AL-1 (for Chief ALJs), AL-2 (for Deputy or Regional Chiefs) , and AL-3 (for line ALJs). The AL-3 pay level contains six steps (AL-3A through AL-3F) to reflect increases gained from experience. The vast majority of the approximately 1,400 ALJs are paid at one of the six AL-3 steps.

Currently, due to pay compression, many Judges at level AL-3E, most Judges at level AL-3F, and all Judges in levels AL-2 and AL-1 earn exactly the same rate of pay. This effectively eliminates any recognition through compensation for greater experience, length of service, or supervisory responsibilities. In addition, it provides no incentive for senior judges to take on the administrative tasks of a Chief or Deputy Chief Judge.

Not only is this unfair to those currently serving as ALJs, this continuing and unchecked pay compression negatively affects ALJ recruitment and the retention of the best candidates available. This problem will dilute the quality of applicants for ALJ positions, so that those eventually retained at lower relative pay levels may be unable to handle the complex and difficult cases which ALJs are currently entrusted to resolve. This problem will further negatively affect the agencies as they begin to realize that they are no longer able to rely upon ALJs to handle these types of cases. This “death spiral” could eventually lead to a weakening and the eventual demise of the ALJ program. This would represent a significant disservice to claimants and litigants in agency proceedings.

OPM has unfortunately addressed this concern in the past by noting no shortage of applicants for ALJ positions. While it is true that there is a register of applicants maintained by OPM with many names on it, it is also true that one can always expect applicants for judicial positions that have a starting salary in the current range. However, unless pay compression is addressed, that pay will continue to decline, relative to historic comparisons, making the position less and less attractive to the best and the brightest experienced attorneys who typically have been interested in ALJ positions.

Already, there is an ever widening gap between current ALJ pay and the pay of career agency staff officials who are responsible for selecting cases for ALJ assignment and reviewing their decisions. For example, the pay of a GS-15 at step 10 is $118,957, whereas the starting pay for an ALJ is $95,500.[1] A similar gap exists between ALJ and Senior Executive Service positions of comparable responsibility, and that gap continues to increase in light of compensation incentives available to many SES managers.[2] We cannot hope to attract the senior agency staff and SES attorneys who are the natural candidates for prospective ALJ positions as this pay inequity continues and the disparity increases. Nor can we hope to attract candidates from the pool of private practitioners who practice before our agencies. While we can never expect to match the kind of salaries offered by top national law firms, the present entry level pay for ALJs is so low as to virtually assure that the ALJ program will be bottom feeding from the private bar, attracting only those whose practices are unsuccessful or worse.

[1] Even the pay of a Washington-based *GS-14* at step 10 ($112,734) exceeds that of a newly hired Washington-based ALJ ($112,213). Note: both of these salaries include locality pay for Washington, D.C.

[2] The minimum SES salary is $109,808, and the cap, exclusive of awards and benefits is $165,200. The current ALJ pay range is $95,500 to $143,000 (locality pay not included). For a Washington based ALJ, the salary range, including locality pay, is $112,213 to $152,000.

Our agencies and the American public deserve better. If they do not get high quality ALJs, the viability of administrative adjudication will be severely compromised. This is a very real concern. The Chairman of my agency expressed his dismay in 2001 over an inability to attract and retain the high quality of ALJs needed to handle FERC's challenging caseload. The situation today is even graver than it was in 2001.

Catch 22-- OPM's Insistence on a Pay for Performance Concession

While OPM recognizes that this pay compression problem requires redress, it has made its support for pay compression relief contingent upon agreement of the ALJ community to adoption of a pay for performance system. However, such a system would violate the provisions of the Administrative Procedure Act and is inconsistent with the very principles upon which that statute is based, particularly if individual performance of ALJs is evaluated.

A brief review of the nature of our work would be helpful to understand the dilemma which OPM's insistence on a pay for performance regime presents for us. The adjudication provisions of the APA were enacted to ensure full, fair and impartial hearings in administrative agencies. Confidence in the independence of adjudicators is an absolutely critical element to claimants and litigants coming before administrative agencies. In order for the administrative hearing process to work as intended by Congress, these litigants and the American public must be assured that the agency cannot influence decisions in administrative hearings Critical to the success of this objective is a delicate balance in the relationship of ALJ adjudicators and their employing agencies. To help achieve this careful balance, the APA exempted ALJs from agency performance ratings. 5 U.S.C. §4301(2)(D). Also barred was the grant of performance awards to ALJs. Further, prohibitions were enacted against *ex parte* communications with ALJs. All of these protections were designed to ensure that ALJs decided cases independently of agency influence or pressure. Performance ratings of ALJs by the agency could

constitute a direct or subtle attempt to influence ALJ decision-making, or be perceived as doing so, and could affect the legitimacy of the process and the outcome of a case. The imposition of such a system would threaten the integrity of the administrative judicial process.

Representatives of the ALJ community have maintained a so far unsuccessful dialogue on the pay compression issue with OPM, which is charged with the responsibility and authority to administer the ALJ program. OPM seems unwilling to acknowledge that judicial independence and the above statutory protections form an inherent construct that cannot be compromised without doing severe damage to the will of Congress, as enacted in the APA. The basic demand of OPM for its support for legislative pay compression relief is an agreement that the ALJs support a system of performance evaluation with "consequences." It is critical that OPM and the Congress understand how any direct or subtle attempt to influence ALJ decision-making, such as by agency ratings of ALJs, would be potentially dangerous to the integrity of the APA's administrative judicial process. Indeed, it would destroy the very reason for the existence of the administrative adjudicatory function. It is very distressing to us that OPM would insist upon a performance program that threatens the validity and legitimacy of ALJ adjudications.

While OPM has acknowledged the importance of ALJ independence and objectivity, it has not provided any specific proposals or any real guidance as to how its desires for a performance program can be reconciled with the requirement that ALJ independence and objectivity be maintained. OPM has, however, suggested that it would be willing to explore with the ALJ community "surrogates" for the performance regime that it favors for federal employees.[3] Our community itself has been engaged in such an

[3] Our ALJ Coordinating Council recently advised OPM's Director Springer about existing programs in place in many agencies and suggested other possible ways that might help achieve OPM's policy goals in the context of the ALJ program. (Letter to

exercise, in the hope that some middle ground can be found that reconciles OPM's policy preferences with the statutory construct of ALJ independence. Reconciliation in a manner that preserves that necessary independence is worthy of study and careful consideration. It may be difficult to achieve, as some of our organizations well know after spending hours upon hours debating how that might occur. In that event, we see no reason why independence and the legitimacy of the administrative adjudication process need to be sacrificed in order to obtain relief from the pay compression dilemma that now confronts us.

Conclusion

The need is great for recognition of the pay compression problem that exists in the ALJ program and for the development of a remedy. Moreover, reformation of the pay schedule to address the pay compression issue need not and should not be linked to the adoption of a pay for performance scheme that threatens to destroy the legitimacy of the administrative adjudication process conceived and enacted by Congress sixty years ago. The door remains open to consider alternative approaches or surrogates that might maintain ALJ independence from agency influence while satisfying OPM's policy objectives. We in the ALJ community are willing to explore these ideas with OPM.

OPM Director Linda M. Springer, dated April 11, 2006)